

The Honorable John H. Chun

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC., *et al.*

Defendants.

Case No. 2:23-cv-0932-JHC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' STANDALONE
MOTION IN LIMINE REGARDING
PUBLIC FTC STATEMENTS**

NOTED ON MOTION CALENDAR:
JUNE 30, 2025

ORAL ARGUMENT REQUESTED

I. Introduction

Defendants' Standalone Motion *in Limine* Regarding Public FTC Statements, Dkt. #291-1, should be denied. Defendants clearly seek reconsideration of this Court's prior rulings without complying with Local Rule 7(h) and without providing any legal or factual basis for changing those rulings. For two reasons, the Court should not reverse its prior rulings only months from trial. First, the prior rulings were correct: the rulemaking documents at issue are irrelevant. Specifically, the FTC's Negative Option Rulemaking Notices—the Advance Notice of Proposed Rulemaking (“ANPRM”), 84 Fed. Reg. 52393 (Oct. 2, 2019), Notice of Proposed

1 Rulemaking (“NPRM”), 88 Fed. Reg. 24716 (Apr. 24, 2023), and Notice of Final Rule, 89 Fed.
 2 Reg. 90476 (Nov. 15, 2024)—concern the FTC’s Negative Option Rule, which is not at issue in
 3 this litigation, and do not constitute official policy interpretations of the Restore Online
 4 Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. §8401 *et seq.* See A. Gali Dec., Atts. 3-5.

5 As a result, the Negative Option Rulemaking Notices are irrelevant, and, hence,
 6 inadmissible. Nor will the FTC seek to introduce other rulemaking comments or public
 7 statements, meaning Defendants cannot lean on a hypothetical rebuttal rationale for introducing
 8 irrelevant statements. In short, because nothing has changed and the Court’s prior decisions on
 9 these points were correct, Defendants’ Motion is an improper motion for reconsideration that
 10 should be denied.

11 Second, even if the Notices had some marginal relevance, the risk of confusion and unfair
 12 prejudice far exceeds any limited probative value. As explained below, Defendants badly
 13 misconstrue the Notices by cherry-picking single sentences from legal documents spanning
 14 dozens of pages, necessitating admission of the entire documents for context. Asking a jury to
 15 construe and contextualize complex administrative procedure documents issued under another
 16 statute is both risky and pointless. Furthermore, admitting the Notices for their only conceivable
 17 relevance—to insinuate that Defendants must have been advised that ROSCA is unenforceably
 18 unclear—is unfairly prejudicial to the FTC because Defendants have not asserted an advice-of-
 19 counsel defense and have blocked any discovery into the advice Defendants actually received.
 20 Moreover, because the Notices at issue receive no deference as interpretations of ROSCA (nor
 21 should they), if the Court allows the Notices into evidence, then fairness requires that the Court
 22 also allow into evidence any statement about ROSCA in the public domain – or, at bare
 23 minimum, *any* such statement the FTC has ever made. However, Rule 403 plainly prohibits the

1 mini-trial on the meaning of administrative notices and various agency statements that
 2 Defendants apparently want.

3 **A. The Court Correctly Held the Statements At Issue Irrelevant, and Nothing**
 4 **Has Changed.**

5 Defendants’ attempts to evade reality—that this Court already properly held the FTC’s
 6 Negative Option Rulemaking Notices irrelevant to this litigation—result in an improper motion.

7 First, there is simply no question Defendants seek reconsideration of this Court’s
 8 previous rulings but fail entirely to offer any basis for such reconsideration and, indeed, even fail
 9 to acknowledge the existence of those prior rulings in this Motion. Despite their contrary claims,
 10 Defendants are well aware this Court has already determined the FTC’s Negative Option
 11 Rulemaking Notices are not relevant to *any* issues or arguments in this case, *including* the
 12 knowledge arguments raised in this Motion. Indeed, in their separate Conditional Motion to
 13 Certify Interlocutory Appeal, Defendants summarized the Court’s denials of their related
 14 motions to compel discovery, Dkt. #146 and #214, as, “[t]he Court held that **the FTC’s**
 15 **statements about ROSCA’s lack of clarity in this ROSCA case are ‘irrelevant.’**” Dkt. #293
 16 at 2 (citing Dkt. #180, Dkt. #241) (emphasis added); *see also* Dkt. #291 at 4 (noting “the Court
 17 has suggested in various orders that the FTC’s statements regarding ROSCA’s lack of clarity—in
 18 the ANPRM and NPRM and other places—*are irrelevant to this case*”) (citing Dkt. #180, Dkt.
 19 #241) (emphasis added). Further, the second proposed question of law in Defendants’
 20 Conditional Motion disputes the irrelevance of the FTC’s Negative Option Rulemaking Notices
 21 to Defendants’ knowledge for the purposes of obtaining civil penalties under Section
 22
 23

1 45(m)(1)(A) of the FTC Act, Dkt. #293 at 1, 10-11, an appeal that makes no sense if the Court
 2 has not already reached such a decision.¹

3 Although the Court issued multiple rulings regarding the irrelevance of the FTC's
 4 Negative Option Rulemaking Notices in this action, *see* Dkt. #165, Dkt. #180, Dkt. #241, it
 5 addressed the specific issue raised in this Motion most clearly in denying Defendants' motion to
 6 compel testimony about the FTC's Negative Option Rulemaking Notices, Dkt. #241. In that
 7 decision, the Court explicitly held the Notices were not official policy statements and, hence,
 8 neither the Notices nor any testimony about those Notices are relevant to this litigation:

9 Although Defendants say that the testimony they now seek to compel includes
 10 'relevant official, public statements,' Dkt. #214 at 15 . . . **the Court has**
 11 **already stated that 'there are no controlling . . . policy statements that**
 12 **reflect an official prior interpretation of ROSCA.**' Dkt. #165 at 43. Thus,
 testimony about statements the FTC made during the Negative Option
 Rulemaking **is irrelevant** to whether Defendants acted reasonably under the
 circumstances.

13 Dkt. #241 at 11 (emphasis added)

14 The Court's language is clear: the Court expressly based its ruling denying the motion
 15 to compel testimony about the Negative Option Rulemaking Notices on its finding that they are
 16 not official policy interpretations of ROSCA and, therefore, are irrelevant. *See also* Dkt. #241 at
 17 6, 9, 12, 14. Nevertheless, Defendants premise their entire pending motion in limine on the
 18 asserted relevance of the Negative Option Rulemaking Notices themselves (as opposed to
 19 testimony about them), and, specifically, the same cherry-picked phrases. *See* Dkt. #214 at 3

21 ¹ Although the FTC disagrees that the Court has issued the precise ruling presented by Defendants' proposed
 22 question of law, *see* Dkt. #293 at 1, and an interlocutory appeal of such an evidentiary decision would be entirely
 23 inappropriate, *see Voskanyan v. Upchurch*, 2022 WL 4181664, at *2 (9th Cir. Sep. 13, 2022) ("This Court has long
 held that 'no interlocutory appeal of a pretrial ruling on the admissibility of evidence is available.'" (quoting
Coursen v. A.H. Robins Co., Inc., 764 F.2d 1329, 1342 (9th Cir. 1985))), there is no question that the parties
 understand the Court has ruled the FTC's Negative Option Rulemaking Notices are irrelevant to Defendants'
 knowledge arguments.

1 (“The FTC’s public statements at issue are relevant for four reasons.”); *id.* (“the FTC’s public
 2 statements about ROSCA’s requirements are relevant to whether Defendants had knowledge of
 3 ROSCA’s requirements, which is an essential element of the FTC’s request for civil penalties”);
 4 *id.* at 4-5 (identifying same phrases from Negative Option Rulemaking Notices as raised in this
 5 Motion); *id.* at 11 (“The FTC’s public statements about ROSCA and Defendants are relevant . . .
 6 (3) to defend against the FTC’s civil penalties demand”). Thus, Defendants moved to compel
 7 testimony about the Negative Option Rulemaking Notices on the grounds that the Notices
 8 themselves were relevant to this litigation. The Court denied the motion, reiterating its prior
 9 finding that the Notices themselves are irrelevant. There is simply no question about the scope
 10 or import of the Court’s prior ruling.

11 In response, Defendants attempt to split hairs and argue (elsewhere, since they do not
 12 mention the Court’s prior rulings in this Motion) that the Court’s finding that all *testimony* about
 13 the Negative Option Rulemaking Notices is irrelevant does not render the Notices themselves
 14 irrelevant. *See* Dkt. #339 at 2. Indeed, they claim they are not seeking reconsideration of the
 15 Court’s ruling that all testimony about the Notices is irrelevant. *See id.* If that is sincere,
 16 granting this Motion would result in an absurd situation: the Notices would come into evidence
 17 but no witness could testify about them. Of course, declining to reconsider the Court’s prior
 18 (correct) ruling resolves the issue: the Notices are irrelevant, and therefore testimony about them
 19 is also inadmissible.

20 Further, by claiming this is not a motion for reconsideration, *see* Dkt. #339 at 1 (arguing
 21 that granting the Motion *in Limine* “does not require the Court to ‘reconsider’ any prior rulings”),
 22 Defendants suggest they are not challenging the Court’s repeated holding that the statements
 23 made during the Negative Option Rulemaking process are not official policy interpretations of

1 ROSCA. Yet, they offer no argument for why statements that are not official policy
 2 interpretations of ROSCA are relevant to this ROSCA case. Again, they simply ignore the
 3 Court’s prior rulings and assert the Notices are relevant as official policy statements. *See* Dkt.
 4 #291-1 at 3 (describing the Notices as “official statements” and “its own official public
 5 statements”); *id.* at 7 n.3 (describing them as “[t]he FTC’s official public statements”); *id.* at 9
 6 (referring to them as “the FTC’s other official statements about ROSCA”). Thus, Defendants are
 7 apparently seeking to admit statements that the Court has held are not policy interpretations of
 8 ROSCA as evidence of the FTC’s official interpretation of ROSCA. Such rulings cannot
 9 coexist, and trying to claim the Motion is not a broad request for reconsideration, while every
 10 argument depends on the Court rejecting its prior rulings, is absurd.

11 Moreover, this Motion is a Trojan Horse. It is not, as Defendants claim, limited to
 12 seeking admissibility of these Notices for purposes of Defendants’ knowledge arguments for
 13 civil penalties. *See* Dkt. #291 at 2; Dkt. #291-1 at 1-2, 7; Dkt. #339 at 1-2. In this and other
 14 motions, Defendants repeatedly admit they are seeking a broader finding of admissibility, one
 15 that would reverse even more of the Court’s previous rulings, without offering any factual or
 16 legal basis for doing so. *See, e.g.,* Dkt. #291-1 at 7 (arguing public statements “are relevant *at*
 17 *least* to whether Defendants had sufficient knowledge for civil penalties”) (emphasis added), 7
 18 n.3 (“The FTC’s official public statements are also relevant to whether ROSCA provides fair
 19 notice of its requirements or that the Prime flows supposedly violate the statute.”), 10 (asking the
 20 Court to “preclude the FTC from excluding its statements on relevance grounds”). Indeed, in
 21 their summary judgment motions, Defendants rely on the Negative Option Rulemaking Notices
 22 to support their due process and ROSCA arguments, despite the Court’s prior finding that these
 23 Notices are irrelevant to such issues. *See* Dkt. #316 at 17 (Individual Defendants’ Motion citing

1 Notices as evidence in support of due process arguments); Dkt. #319 at 9 (Amazon Motion citing
 2 Notices as evidence in support of ROSCA arguments); Dkt. #339 at 2-3 (noting “the Court has
 3 opined on the relevance of the FTC’s prior, official public statements to Defendants’ due-process
 4 defense”); *see also* Dkt. #241 at 7 (holding testimony about Notices irrelevant to ROSCA claims
 5 because the “the Negative Option Rule does not affect ROSCA’s current requirements”), 14
 6 (finding “testimony about statements made during the FTC’s Negative Option Rulemaking,
 7 which is not at issue here, is irrelevant to Defendants’ due process defense”); Dkt. #180 at 11.
 8 Because Defendants seek reconsideration without complying with LR 7(h), and offer no legal or
 9 factual basis to justify changing the Court’s prior rulings, their motion should be denied.²

10 **B. The Court Correctly Ruled That the Statements Are Irrelevant.**

11 Beyond Defendants’ failure to meet or even invoke the standard for reconsideration,
 12 Defendants fail to demonstrate the Court’s prior rulings were wrong; *i.e.*, Defendants do not
 13 show why statements that are not official policy interpretations of ROSCA are relevant to this
 14 ROSCA case. Defendants misrepresent the Notices’ content in an effort to twist them into
 15 relevance, but this fails to make them probative of Defendants’ knowledge. The relevant
 16 knowledge inquiry is whether Defendants had “actual knowledge or knowledge fairly implied on
 17 the basis of objective circumstances” that their actions violated ROSCA. 15 U.S.C. §
 18 45(m)(1)(A). The FTC’s statements in promulgating the Negative Option Rule do not bear on
 19
 20

21 ² Defendants’ Motion is also improper because it seeks to admit, as official statements by the FTC, summaries of
 22 comments provided to the FTC by third parties. Specifically, Defendants include—in both this Motion and their
 23 summary judgment motions—citations to the FTC’s summary of comments from State Attorneys General provided
 to the FTC as part of the Negative Option Rulemaking process. *See* Dkt. #291-1 at 5, 8; Dkt. #319 at 35.
 Defendants do not even attempt to address the insurmountable hearsay issues with regard to those summaries; as a
 result, to the extent Defendants’ Motion seeks to admit such statements, it must be denied for this additional reason.

1 Defendants' knowledge, whether actual or fairly implied, of ROSCA violations for several
2 reasons.

3 First, Defendants' case for the Notices' relevance misrepresents what they actually say.
4 The language Defendants from the Negative Option Rulemaking Notices simply does not say
5 what Defendants claim, namely that the FTC has "admitted" ROSCA is so woefully unclear that
6 no one, or at least the Defendants, would know how to comply. *See* Dkt. #291-1 at 3 ("[s]ince
7 2019, the FTC has made numerous official statements recognizing that [ROSCA] does not
8 provide private parties with enough guidance to know how to comply with the statute"); *id.* ("*the*
9 *FTC* repeatedly admitted that ROSCA is unclear and provides the business community with
10 insufficient guidance on how to comply") (emphasis original); *id.* (the FTC's "own public
11 statements that ROSCA's requirements are unclear"); *id.* ("the FTC's own admission that
12 ROSCA is unclear and does not provide guidance"); *id.* at 4 ("the FTC publicly recognized in
13 official documents that ROSCA's undefined terms do not clearly inform businesses of what they
14 must do to comply with the statute"); *see also* Dkt. #293 at 1 (the FTC "has admitted that the
15 underlying statute lacked clarity"); *id.* at 2 ("the FTC's statements about ROSCA's lack of
16 clarity"); *id.* at 11 ("a statute the FTC itself has admitted is unclear"); Dkt. #319 at 36 ("the
17 FTC's comments about ROSCA's ambiguity").

18 However, Defendants do not identify a single statement by the FTC in the Negative
19 Option Rulemaking Notices that ROSCA is ambiguous, unenforceably "unclear," or lacks
20 sufficient detail for sellers to know when they are in violation. The closest they come is quoting,
21 "the current framework does not provide clarity about how to avoid deceptive negative option
22 disclosures and procedures," Dkt. #291-1 at 8 (quoting ANPRM, 84 Fed. Reg. at 52396, NPRM,
23 88 Fed. Reg. at 24718), which they elsewhere twist into "*ROSCA* . . . lacks 'clarity about how to

1 avoid deceptive negative option disclosures and procedures,” *id.* at 5 (emphasis added); *see also*
2 Dkt. #293 at 4 (same). However, as the preceding paragraphs in the Notices make evident, the
3 “current framework” does not refer specifically to ROSCA but to the “existing patchwork of
4 laws and regulations” that includes ROSCA, the Telemarketing Sales Rule, and the Negative
5 Option Rule. The Notices then explain this framework results in different rules applying
6 depending on how the negative option offer is made (for instance, via phone as opposed to
7 online) and leaves some common negative option practices entirely uncovered. *See* ANPRM,
8 84Reg. at 52396; NPRM, 88 Fed. Reg. at 24718.

9 Although the Notices do state, as an example of the “current framework” not providing
10 “clarity,” that ROSCA “lacks specificity about cancellation procedures and the placement,
11 content, and timing of cancellation-related disclosures,” noting the statute requires marketers to
12 provide “a simple mechanism” for consumers to stop recurring charges but “does not specify
13 what methods would satisfy this requirement,” ANPRM, 84 Fed. Reg. at 52396; NPRM, 88 Fed.
14 Reg. at 24718, Defendants cannot equate recognition of a lack of specificity in the statute with an
15 admission the statute is unenforceably unclear or negate a defendant’s knowledge of
16 noncompliance. In any event, it is unnecessary to admit the FTC’s Negative Option Rulemaking
17 Notices for Defendants to argue that ROSCA lacks detail; the statute’s level of detail is clear
18 from its face. The question is not whether ROSCA has—or could have—more detail; the
19 question is whether Defendants had actual knowledge or knowledge fairly implied on the basis
20 of objective circumstances that their cancellation flow, with its multiple steps, confusing buttons,
21 and continuous distractions, was not simple and, therefore, violated ROSCA. Nothing in the
22 Negative Option Rulemaking Notices contributes to that determination.

1 Second, and for similar reasons, Defendants’ reliance on the statement that “ROSCA . . .
 2 provides no details regarding steps marketers must follow to comply with these provisions,” Dkt.
 3 #291-1 at 8, is not probative of their knowledge of violating ROSCA’s requirements of clear and
 4 conspicuous disclosures and express, informed consent. Again, the question before the jury is
 5 not whether ROSCA could have additional detail; the question is whether Defendants had
 6 sufficient knowledge they were violating ROSCA’s requirements to clearly and conspicuously
 7 disclose all material terms of Prime before obtaining consumers’ billing information and to
 8 obtain consumers’ express, informed consent to those material terms. Nothing in the Negative
 9 Option Rulemaking Notices contributes to those determinations either.

10 Obviously, Defendants cannot argue the FTC’s Negative Option Rulemaking Notices are
 11 relevant based on a complete mischaracterization of the language and its import. The question is
 12 not whether an official policy statement by the FTC that ROSCA is ambiguous or unenforceably
 13 unclear would be relevant to Defendants’ knowledge arguments, because that is not the
 14 evidence.³ The question is whether statements in Federal Register Notices regarding proposed
 15 amendments to the Negative Option Rule that ROSCA lacks detail, specificity, or guidance are
 16 relevant to this litigation. Even if the Negative Option Rulemaking were relevant to this
 17 proceeding, which the Court has correctly found it is not, those statements are not probative of
 18 any issues before the jury because there is no dispute about what the language of the ROSCA
 19 statute is, only whether Defendants had sufficient knowledge for the jury to impose civil
 20 penalties for their violations of it.

21
 22
 23 ³ Given Defendants’ prior admission that ROSCA is “facially clear,” Dkt. #131 at 29, any argument the statute itself
 is vague or ambiguous has been waived. *See also* Dkt. #165 at 41 (finding “Amazon concedes that ROSCA is not
 vague”); *id.* at 45 (finding “Defendants have said that ROSCA is ‘facially clear’”).

Further, Defendants are not seeking to introduce the Notices as relevant to Defendants' actual knowledge (or lack thereof) of the law. Indeed, despite being aware of the FTC's investigation since March 2021 and the filing of this lawsuit in June 2023, Individual Defendants continue to deny knowing about ROSCA or its requirements, or at least they continue to assert an absence of evidence on these points. *See* Dkt. #316 at 23-24; Dkt. #319 at 35-37; *but see* Dkt. #379 at 13 (admitting FTC's 2021 Civil Investigative Demand put Individual Defendants on notice of ROSCA).⁴ Hence, they are not arguing they relied on the FTC's Negative Option Rulemaking Notices in any way, or that the Notices are relevant to their actual knowledge. Instead, they suggest the mere existence of these statements is relevant to the jury's determination of whether knowledge of the ROSCA violations could be fairly implied to them on the basis of objective circumstances. If that were true, however, any and all public statements referring to ROSCA or its requirements should be considered relevant to the analysis, whether Defendants had any knowledge of them or not. For example, the FTC should be able to introduce the comment from the Performance-Driven Marketing Institute ("PDMI") in the 2023 NPRM that "the concept of simple cancellation is well understood by sellers in the marketplace." NPRM, 88 FR 24716, 24723, Gali Dec. Att. 4. The FTC should also be able to introduce every complaint it has filed alleging violations of ROSCA, along with any briefs filed in any action alleging ROSCA claims, any press releases relating to ROSCA or cases involving ROSCA

⁴ Elsewhere, Defendants imply these dates are outside "the relevant period," *see* Dkt. #316 at 23-24 (arguing there is no evidence Individual Defendants "knew" of ROSCA during "the relevant period" without regard to the obvious knowledge of ROSCA (and their violation of it) gained by these individuals through the FTC's investigation and litigation). However, Defendants also argue the FTC's 2024 Negative Option Rulemaking Statements, which post-date the filing of the Complaint in this case, are relevant to their knowledge arguments because they "predate at least some of the alleged conduct" where "the FTC has charged that Defendants are continuing to violate ROSCA to this day" Dkt. #291-1 at 9 n.5. Thus, Defendants implicitly concede knowledge gained from the FTC's investigation and this litigation is relevant to assessing whether they have sufficient implied knowledge for the imposition of civil penalties in this matter.

claims, and any orders—whether stipulated or litigated—arising from those actions. The FTC should also be able to introduce:

- press releases the FTC issued concerning ROSCA, *see, e.g.*, Gali Dec., Atts. 6-11 (examples);
- FTC blog posts about ROSCA, *see id.* at 12-13;
- Blog posts about ROSCA by Amazon’s outside counsel (and counsel of record in this action), *see id.* at 14-15; and
- countless articles and blogs that have been written about ROSCA since 2011, including by numerous law firms providing guidance on how to comply with the statute, *see id.* at 16-17.

If the FTC’s public commentary—which is not due any deference⁵—on the meaning of ROSCA is relevant, then so, too, is this other public commentary. This result, in addition to being absurd, would violate Federal Rule of Evidence 403, as discussed further below.

The Court has correctly found that the FTC’s Negative Option Rulemaking Notices, which are not official policy interpretations of ROSCA, are irrelevant to what ROSCA requires, whether Defendants had fair notice of those requirements, or whether Defendants had sufficient knowledge of their ROSCA violations in order to impose civil penalties. Defendants’ attempt to twist those statements into something relevant to this litigation would add nothing of value but would open the door to countless additional “sources of objective knowledge” that cannot possibly assist the trier of fact in resolving this matter.

⁵ *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (“[A]gency interpretations of statutes . . . are not entitled to deference.”).

1 **C. The FTC Will Not Seek To Introduce Regulatory Comments.**

2 Presumably recognizing the weakness of their argument, Defendants attempt to justify
3 their Motion on hypothetical fairness grounds. Specifically, Defendants argue they should be
4 allowed to introduce the FTC’s Negative Option Rulemaking Notices because the FTC cannot
5 introduce its own 2021 Enforcement Policy Statement Regarding Negative Option Marketing
6 without rendering “the FTC’s other official statements about ROSCA in the ANPRM and NPRM
7 . . . also relevant.” Dkt. #291-1 at 9. Aside from the significant differences between the
8 documents, Defendants cannot escape the fact that the FTC *has not sought to introduce its 2021*
9 *Enforcement Policy Statement* in this litigation, and will not do so unless it must introduce it (and
10 the balance of the Notices, and other otherwise extraneous public statements) to respond to
11 Defendants’ cherry-picked selections from the Notices.

12 The only evidence Defendants point to of the FTC “using” this Policy Statement is during
13 a Rule 30(b)(6) deposition, where the FTC witness identified the 2021 Enforcement Policy
14 Statement, along with the ROSCA statute, FTC enforcement actions, and orders, in response to
15 Defendants’ question about possible sources of guidance on *the FTC’s view* of compliance with
16 ROSCA. Basta Dep. 293:8-295:22, Gali Dec., Att. 18. Clearly, the mere possibility the FTC
17 *might* seek to introduce a document into evidence cannot provide a basis for preemptively
18 admitting other evidence on the grounds of fairness. Unless and until the FTC seeks to admit its
19 2021 Enforcement Policy Statement—which it will not do assuming Defendants’ Motion *in*

1 *Limine* is denied—this argument is moot and cannot form the basis for granting Defendants’
 2 Motion *in Limine*.⁶

3
 4 **II. Rule 403 Prohibits a Confusing, Prejudicial Mini-Trial on the Meaning of**
 5 **Statements in a Rulemaking Under Another Statute.**

6 Even assuming the Negative Option Rulemaking Notices have marginal relevance, the
 7 potential of unfair prejudice, confusion, and waste of time substantially outweighs any limited
 8 probative value. *See* FRE 403.⁷

9 As discussed, Defendants’ arguments make clear they do not in truth wish to use the
 10 FTC’s Negative Option Rulemaking Notices for the unnecessary purpose of establishing
 11 ROSCA lacks detail or specificity in its provisions. Instead, they want to use the Notices to
 12 falsely suggest to the jury that *the FTC believes* the entire statute is unenforceably ambiguous
 13 such that, no matter the specific facts, neither Amazon nor its executive officers could have
 14 known they were violating ROSCA. Their language to date—including their claim in summary
 15 judgment that the Notices equate to an admission ROSCA is ambiguous—confirm these
 16 intentions. As the Court has made clear, what the FTC believes about ROSCA simply is not
 17 relevant to the issues before the Court. *See* Dkt. #180 at 12 (“the FTC’s interpretation of
 18 ROSCA is irrelevant to the Court’s interpretation of the statute”). Moreover, such insinuations
 19

20 ⁶ The 2021 Enforcement Policy Statement contains numerous statements that would support a finding Defendants
 21 objectively should have known their practices were in violation of ROSCA. *Id.* at 9-14, Gali Dec., Att. 2..
 Presumably, although the Motion does not acknowledge it, Defendants would object to the introduction of the 2021
 Enforcement Policy Statement on its own, highlighting further that this argument is a red herring.

22 ⁷ Although Rule 403 has limited applicability where the Court is the finder of fact, such as in resolving the parties’
 23 summary judgment motions, Defendants have made clear their Motion is focused—at this point—on the
 admissibility of the FTC’s Negative Option Rulemaking Statements at trial, and Rule 403 is specifically aimed at
 evidence presented to a jury. *See* Fed. R. Evid. 403 (noting concern about “misleading the jury” as basis for
 exclusion).

1 about the FTC's beliefs would unfairly prejudice the jury against the FTC – just what Rule 403
2 seeks to prevent. Fed. R. Evid. 403. The Court should thus not permit evidence that has no
3 probative value and a significant likelihood of prejudicing the jury.

4 Defendants also seek to use the Notices to create unfair prejudice in a second way. As
5 with their proposed testimony from James C. Cooper, they seek to suggest Defendants must have
6 received legal advice blessing their actions, and thus could not have knowledge fairly implied
7 they were violating ROSCA, without evidence that such advice was ever given. Dkt. #386 (June
8 24, 2025) at 4-5; *see also* Dkt. #354 (June 17, 2025) at 40-41 (raising this issue in opposition to
9 Defendants' motion for summary judgment). In other words, because (supposedly) the FTC
10 stated ROSCA was unclear, that must be the (undisclosed) advice the Defendants received.
11 Indeed, as the FTC noted in opposing admission of Cooper's testimony, Defendants have
12 repeatedly implied that the basis for their belief they were not violating ROSCA was advice of
13 counsel, *see* Dkt. #343 at 757, 774-75, 885-86, yet they have refused to reveal that advice and
14 blocked any discovery into what they actually knew. Defendants' effort to claim no one could
15 know if they were violating ROSCA because even the FTC thought it "lacked specificity" is
16 another attempt to buttress its wrongful use of the attorney-client privilege as both a sword and a
17 shield. *See, e.g., Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). This underscores the
18 extreme prejudice facing the FTC if Defendants are allowed to use the Notices in this way –
19 because the FTC was not permitted to discover the actual advice Defendants received, the FTC
20 is wholly unable to rebut the insinuations the Defendants will make from the notices, *i.e.*, that
21 they must have been told they were in the clear.

22 In addition, introducing the FTC's Negative Option Rulemaking Notices will badly
23 confuse the issues. As this Court has recognized repeatedly, the FTC's Negative Option Rule is

1 not relevant here; Defendants have been charged with violating Section 5 of the FTC Act and
 2 ROSCA, not the Negative Option Rule. Although Defendants focus exclusively on cherry-
 3 picked phrases from the Notices, the Notices contain numerous parts, including summaries of
 4 comments from third parties, the then-current scope of the Negative Option Rule, considerations
 5 of whether to amend the Negative Option Rule, proposed language for amending the Negative
 6 Option Rule, and considerations of any negative impacts from amending the Rule. If Defendants
 7 are permitted to introduce isolated phrases from the Notices, much of the remainder of the
 8 documents should in fairness be considered alongside them to make the meaning of those
 9 statements clear. Fed. R. Evid. 106. Admitting the statements would thus result in a “mini trial”
 10 over a tangential issue: the meaning of statements the FTC made in promulgating the Negative
 11 Option Rule, which is not at issue in this case. See *Tennison v. Circus Circus Enterprises, Inc.*,
 12 244 F.3d 684, 690 (9th Cir. 2001) (upholding exclusion of evidence under Rule 403 where it
 13 would have necessitated mini-trials over “remote events” and would be prejudicial).⁸ The risk of
 14 confusing the issues before the jury or misleading them about the import of the Notices thus
 15 significantly exceeds any limited probative value in allowing Defendants to extract and highlight
 16 specific phrases from those Notices.

17
 18
 19
 20 ⁸ Cf. *United States v. Gustafson*, 528 F.3d 587, 592 (8th Cir. 2008) (“[M]aterial interpreting statutes and legal
 21 opinions, as well as the legal opinions themselves, would have had a high potential to confuse the jury and conflict
 22 with the court's responsibility to instruct on the law.”) (internal quotation omitted); *Egbert v. Nissa N. Am.*, No. 04-
 23 CV-551 PGC, 2006 WL 6503320, *8 (D. Utah Mar. 1, 2006) (excluding evidence of NHTSA determination not to
 act under Rule 403 because “even assuming some probative value . . . the prejudicial effect of confusion of issues
 would substantially outweigh any probative value. The jury (and presumably the lawyers) will be drawn into a
 debate about why NHTSA acted (or rather, decided not to act). This would involve consideration of why NHTSA
 makes decisions, what is the scope of rulemaking, what it means for a federal agency not to act, and a host of related
 considerations that have nothing to do with the lawsuit at hand”).

1 Finally, admitting the Negative Option Rulemaking Notices at this stage of the litigation
 2 wastes time.⁹ As discussed above, allowing the Notices to be considered as “objective evidence”
 3 relating to Defendants’ knowledge would necessarily require admitting countless other
 4 documents setting forth opinions and interpretations of ROSCA that are equally probative on that
 5 issue. Even without that deluge of extraneous documents, allowing these Notices in for this
 6 purpose would require the parties and the Court to waste significant trial time explaining the
 7 Notices and their applicability, or lack thereof, to this litigation, all for the limited benefit of
 8 confirming what they can argue from the face of the ROSCA statute itself. *See Old Chief v.*
 9 *United States*, 519 U.S. 172, 184-85 (1997) (holding that “when Rule 403 confers discretion by
 10 providing that evidence ‘may’ be excluded, the discretionary judgment may be informed not only
 11 by assessing an evidentiary item’s twin tendencies, but by placing the result of that assessment
 12 alongside similar assessments of evidentiary alternatives”); *see also id.* at 182 (embracing
 13 approach that requires court resolving objection under Rule 403 to “decide whether a particular
 14 item of evidence raised a danger of unfair prejudice” and, if so, then “to evaluate the degrees of
 15 probative value and unfair prejudice not only for the item in question but for any actually
 16 available substitutes as well”).

17 **III. Conclusion**

18 Defendants’ Motion *in Limine* is an improper attempt to reargue decisions of this Court
 19 without even attempting to offer a legal or factual basis for reconsideration. The Court has
 20 properly held the Notices relating to the Negative Option Rule, which is not at issue in this case,
 21

22
 23 ⁹ Additionally, Defendants have made clear they believe such a determination would require reopening discovery,
see Dkt. #293 at 7, 12. It is far too late for that.

1 are not official policy interpretations of ROSCA and are not relevant to this litigation.
2 Defendants' hypothetical fairness argument and mischaracterization of the Notices and their
3 import do not change that determination. Both because the Notices are not relevant and because,
4 alternatively, any supposed probative value is significantly outweighed by the risks of prejudice,
5 confusion, and waste of time, Defendants' Motion should be denied.

LOCAL RULE 7(e) CERTIFICATION

I certify that this memorandum contains 5,324 words, in compliance with the Local Civil Rules.

Dated: June 30, 2025

s/ Jeffrey Tang

JONATHAN COHEN (DC Bar #483454)
EVAN MENDELSON (DC Bar #996765)
JONATHAN WARE (DC Bar #989414)
SANA CHAUDHRY (NY Bar #5284807)
ANTHONY SAUNDERS (NJ Bar #008032001)
OLIVIA JERJIAN (DC Bar #1034299)
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington DC 20580
(202) 326-2551; jcohen2@ftc.gov (Cohen)
(202) 326-3320; emendelson@ftc.gov (Mendelson)
(202) 326-2726; jware1@ftc.gov (Ware)
(202) 326-2679; schaudhry@ftc.gov (Chaudhry)
(202) 326-2917; asaunders@ftc.gov (Saunders)
(202) 326-2749; ojerjian@ftc.gov (Jerjian)

COLIN D. A. MACDONALD (WSBA # 55243)
Federal Trade Commission
915 Second Ave., Suite 2896
Seattle, WA 98174
(206) 220-4474; cmacdonald@ftc.gov (MacDonald)

RACHEL F. SIFUENTES
(IL Bar #6304016; CA Bar #324403)
Federal Trade Commission
230 S. Dearborn St., Room 3030
Chicago, IL 60604
(312) 960-5617; RSifuentes@ftc.gov

JEFFREY TANG (CA Bar #308007)
Federal Trade Commission
10990 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024
(310) 824-4303; JTang@ftc.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION